EU Free Movement as a Legal Construction – not as Social Imagination

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Monetary union demonstrates that some EU projects are realised without preparation for all eventualities. In the case of the euro, the financial crisis revealed lacunae in the field of economic and budgetary supervision, which the euro countries had to bridge through the introduction of new instruments. In the case of Union citizenship the legal gaps are less dramatic, but nonetheless visible – in particular with regard to access to social benefits for persons who do not work. It was these uncertainties that the European Court of Justice (ECJ) had to confront in the *Dano* judgment of last Tuesday. It opts for a surprisingly conventional solution, which abandons earlier attempts to conceive of Union citizenship as a projection sphere for political visions of a good life and just society.

The European Court of Justice as Legal Technician

A reminder of the debate about the Free Movement Directive demonstrates the absence of clear political guidance. Initially, the EU Commission had suggested to lay down explicitly that Union citizens who do not work should not have access to social benefits during the first five years of their stay in another EU country (Art. 21.2). It later abandoned the project after the ECJ had ruled in *Grzelczyk* that similar provisions on study grants do not pre-empt recourse to the Treaty guarantee of non-discrimination. As a result, the final version of the Free Movement Directive reiterated existing Treaty rules, whose precise bearing for people like Ms Dano remained unclear. Otherwise put, there was never a positive political agreement at EU level on the status of Union citizens who do not work. This shifted the responsibility upon judges to resolve open questions.

Judges in Luxembourg used this room for manoeuvre for progressive decisions on various occasions. Judgments such as *Grzelczyk*, *Martínez Sala*, *Collins*, *Trojani*, *Bidar*, *Vatsouras* and *Ruiz Zambrano* constitute the most ambitious and tantalising line of case law in recent memory. They are characterised by an attempt to breathe life into the abstract Treaty provisions on Union citizenship by granting equal access to social benefits for various categories of economically inactive citizens irrespective of the limits laid down in secondary legislation. It would have been possible for the Court to decide the *Dano* case differently under recourse to the argumentative arsenal of these judgments.

That did not happen. For more than a decade, the ECJ had ignored the arguments put forward by his most outspoken academic critic, Kay Hailbronner – but they now dominate its reasoning on why citizens like Ms Dano cannot claim social benefits. This presents us with a noteworthy shift of emphasis from a promise of equality inherent in EU citizenship towards the 'limitations and conditions', which primary law had always provided for (Art. 21.1 TFEU). Judges abandon the aspirational underpinning of the citizenship concept to the benefit of conventional doctrinal arguments such as the wording or the systematic structure. In short, the Court turns into a legal technician.

Anuscheh Farahat criticises the Court's outcome and, yet, she follows a similar path as the ECJ, when she argues that the technical rules on inter-state social security coordination mandated a different outcome. It is not convincing to maintain that this specialised field of secondary law should have defined the answer, not least since doing so would have required the Court to disconnect the interpretation of the non-discrimination principle in Article 4 of Regulation (EC) Nr. 883/2004 from primary law. A fundamental question, such as this one, should be answered primarily on the basis of the EU Treaties and the citizenship concept – even by those who disagree with the Court's conclusion.

It seems to me that the outcome of the *Dano* case is no coincidence. Judges in Luxembourg are not autistic and listen to the general political context. The *Pringle* judgment on the compatibility of the ESM Treaty with the rules

on monetary union was a case in point – and the same held for the *Förster* ruling, in which the Court shied away from open conflict with the EU legislator, when it accepted a five-year waiting period for access to study grants for incoming EU students in line with the Free Movement Directive. The Grand Chamber deciding the *Dano* case will have considered potential implications of its judgment for the overall support for the integration project at a time, when eurosceptic political parties are on rise across the continent, not only in the United Kingdom.

Certitude instead of Ambivalence

The ECJ's conclusion is surprisingly clear-cut. In three argumentative steps it finds that Union citizens who are economically inactive need sufficient resources to maintain themselves; without these resources they hold no right to free movement and cannot, as a result, invoke the non-discrimination guarantees of Union law. For this outcome, the subjective intention of the person concerned is irrelevant – notwithstanding the reference to citizens who move 'solely in order to obtain … social assistance' (para 78). The official answer given to the domestic court and the legal reasoning leave no doubt that equal treatment cannot be claimed in the absence of free movement rights, irrespective of the individual motivation why citizens moved to another Member State.

Such clarity was no foregone conclusion. One characteristic of the above-mentioned line of earlier judgments is the orientation at the facts of the case at hand. Judges in Luxembourg have repeatedly rejected abstract national legal rules, which did not take account of the living situation of the person concerned. Doctrinally, this emphasis on the individual rests upon the 'certain degree of integration' formula, which judges in Luxembourg had established as the relevant yardstick – albeit without laying down precise criteria how national authorities should apply this rule.

In *Dano*, the Grand Chamber evades these pitfalls by excluding citizens without a free movement right from the scope of the non-discrimination principle *ratione personae*. This has the advantage of not shifting the final decision upon administrative authorities, since it is questionable to let civil servants decide on a case-by-case basis whether citizens are sufficiently integrated into the host society. Such issues are best decided by the legislator, which had unfortunately evaded clear guidance for the Court in the adoption of the Free Movement Directive. Against this background, the *Dano* judgment may be read as a welcome exercise in judicial restraint.

Notwithstanding the clear outcome, the *Dano* judgment resolves not all practical and/or legal problems surrounding free movement. We learnt last Tuesday that those who do not work cannot rely upon free movement and non-discrimination guarantees without sufficient ressources, while the legal status of job-seekers with 'genuine chances of being engaged' remains unresolved as long as the ambiguities of the *Vatsouras* judgment have not been untangled. Moreover, there continue to be principled uncertainties how to define the 'sufficient resources' criterion, which determines whether citizens outside the labour market can claim a free movement right in the first place.

With regard to Ms Dano, the ECJ relied upon the conclusion of the domestic court that this was not the case (para 81). Any such evaluation follows the standards put forward in the *Brey* judgment of September 2013, which instructed national authorities to assess whether the person concerned was 'becoming an "unreasonable" burden' on the social security system of the host state – without being crystal clear whether the underlying proportionality test concerns the individual case only or, alternatively, the overall situation in the host country. In *Dano*, the Grand Chamber indirectly opts for the first solution with the focus on the individual (para 80). For this reason, Farahat's criticism of the absence of an empirical assessment of the overall situation in Germany misses the point, since the Grand Chamber considers the latter to be legally irrelevant.

Limits of European Integration

Across Europe, it is often said that the ECJ will opt for 'more integration' in cases of doubt. It seems to me that this conviction is loop-sided and can be explained, among others, by a tendency on the side of the Court to combine radical landmark judgment with more restrictive follow-up rulings, most recently in later retreats from the innovative *Åkerberg Fransson* and *Ruiz Zambrano* judgments. Against this background, the *Dano* decision should be seen as a prominent counterpoint to the expansive reading of Union citizenship in earlier case law. The latter remains intact as a matter of principle, but it is not extended Union citizens who are economically

inactive.

This outcome is remarkable in itself, but it also has wider repercussions for our understanding of European Union law. By establishing the 'citizenship' of the Union, the Treaty of Maastricht had introduced a concept into the primary law, which may serve as a projection sphere for political visions of a good life and a just society; it is the aspirational openness of the citizenship concept which explains why it has long guided the call for ever wider social and political inclusion. In *Ruiz Zambrano*, the Court followed down this road (only to retreat a few months later). To me, it is the most noteworthy lesson from the *Dano* judgment that this road was not followed. Judges in Luxembourg treat the free movement of Union citizens in essence as a matter of legal construction – not as a projection sphere for political imaginations about social justice.

For legal academics, this approach presents a powerful reminder that there are limits to transformative integration through law. Treaty changes and case law alone are not capable of establishing an enhanced degree of pan-European identity and solidarity – irrespective of whether the Court considers Union citizenship to be 'destined to be the fundamental status of nationals of the Member States.' National and European constitutional rules are no self-fulfilling prophecies, but need to be embedded into social structures and the political life across Europe. They participate in the constant reconstructing of identities and self-perceptions, but cannot change them single-handedly. It is an achievement of the *Dano* judgment not to have overstretched Union citizenship.

This does not imply that Union citizenship has lost its relevance. Earlier case law remains intact and continues to pose important questions – as another pending reference demonstrates, which requires the Court to decide whether the rigidity of the *Dano* case can be extended to jobseekers with genuine chances of being employed. Luxembourg may have rejected a quasi-federal understanding with expansive equal treatment guarantees for all, thereby continuing a number of recent judgments, which can be read as painting a picture of 'good' and 'bad' citizens. Doing so effectively reactivates the traditional notion of 'market citizenship', which concentrates on those who engage in transnational economic activities. In this resect, Union citizenship remains incomplete, if its promise of equality does not extend to all those who have the status.

To be continued – in the Member States…

The outcome of the *Dano* case is not just a reminder of the limits of European Union law; it also relegates responsibility to the national arena. This is emphasised by the Court's answer to the fourth question, which unequivocally rejects an application of the EU Charter of Fundamental Rights with its extensive social rights and principles to the *Dano* case (paras 85-92). Doctrinally, this conclusion is straightforward given that the Grand Chamber rejects an application of both the free movement law and the non-discrimination principle. Yet, this accentuates the rejection, on the side of the Court, to embark upon broader constitutional imaginations of social justice. The Charter may embrace some generously formulated social rights and principles, but their impact is limited indeed – both for Ms Dano and for austerity measures as a response to the euro crisis.

In a certain way, the European Court of Justice abdicates responsibility by handing the future fate of Ms Dano back to national authorities. German authorities will now have to decide whether to deport the single mother and her little sun (something which authorities are, for good reasons, never keen to do), also knowing that Ms Dano might soon afterwards try to return to Germany in order to live again with her sister in Leipzig. Thus, the presence of 'illegal' EU migrants without free movement rights might soon become a reality across Europe. This might prompt the European Court of Human Rights to step in, which had found in an important judgment one week earlier that states are obliged to provide shelter and basic social services to asylum seekers as a human rights' requirement. Ms Dano might soon ask for the same treatment. This call will not be directed to Luxembourg, though. For the ECJ this file has been closed. Others will have to take responsibility for those holding a 'fundamental status' called Union citizenship.

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